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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-5781

FRANK RAKAS AND LONNIE KING, PETITIONERS

-vs-

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONERS

G. JOSEPH WELLER
Assistant Defender
Office of the State Appellate Defender
Third Judicial District

OF COUNSEL

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 46 Ill. App. 3d 569, 360 N.E. 2d 1252 (1977) (See Appendix A). Also attached hereto is the unreported Order of the Appellate Court of Illinois, Third Judicial District, denying Petitioner's Petition for Rehearing (See Appendix B).

The Order of the Illinois Supreme Court denying Leave to Appeal is not reported, however, a copy of the Order is attached hereto (See Appendix C).

JURISDICTION

The Order of the Illinois Supreme Court was entered on September 30, 1977. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3). This Petition for a Writ of Certiorari is filed within ninety days of that Order.

QUESTIONS PRESENTED FOR REVIEW

Whether a passenger legitimately present in an automobile has standing to challenge the constitutionality of a warrantless police search of the automobile in which he was riding.

Whether the person against whom a search is directed has an independent basis for standing to contest the lawfulness of the search.

CONSTITUTIONAL PROVISIONS

United States Constitution

Amendment (IV)

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment (XIV)

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the legal protection of the law.

STATEMENT OF THE CASE

The Petitioners, Frank L. Rakas and Lonnie L. King, were convicted of armed robbery in the Circuit Court of Kankakee County, Illinois. The most significant evidence against them was a rifle (People's Exhibit 1) which one of the robbery victims identified as being the same weapon used by the masked robbers (A80).[1]

This rifle was the subject of a Motion to Suppress filed by Petitioners prior to trial wherein it was asserted that the evidence had been illegally seized by police from a search of an automobile in which the Petitioners were, at that time, riding as passengers (A28-30). During the pre-trial hearing on the Motion, the Petitioners and Police Officer Donald Sollers testified as defense witnesses.

Officer Sollers testified that, while on patrol, he spotted a purple Plymouth Roadrunner, occupied by two males and two females, which he thought might be the blue Roadrunner used as a getaway car by the two unknown male robbers (A48). The car he saw, however, had a different license number than the getaway car and lacked other described characteristics (A50-51). Nevertheless, he followed the car to a lounge where the four occupants, i.e.

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[1] References are made to the Abstract of Record filed by Petitioners in the Appellate Court.

the Petitioners and their female companions, went inside for about forty minutes (A50). Sollers then telephoned the Sheriff's dispatcher and was told that one of the males, dressed in a blue shirt, matched the limited description given of one of the robbers (A49). [Testimony during the trial-in-chief established that the robbers wore ski masks (A59). Moreover, the clothing worn by the Petitioners when arrested (A58, 59, 61) did not match the clothing descriptions of the robbers given at trial (A58, 59, 61). Nor did the preliminary police reports, included in the record on appeal, suggest that the police were looking for men dressed as were the Petitioners (A5-8).]

After the Petitioners left the lounge and were again proceeding on the highway, an assembly of policemen stopped their car and ordered the occupants out at gunpoint (A49); and an ensuing search of the automobile then disclosed the rifle (A50). Before the search, none of the occupants were placed under arrest (A49), permission to conduct the search was not sought (A50), and the seized evidence was not visible from outside the car (A50).

The driver of the automobile was one of the Petitioners' female companions, Janette M. Clontz (A45). The Petitioners both agreed on cross-examination that Ms. Clontz was also the owner of the automobile in which they were riding as passengers (A46, 47). Consequently, the prosecutor made an oral motion to dismiss the Petitioners' Motion to Suppress on the ground that, since it was not their car, they had no standing to contest the legality of the search. The trial judge thereupon promptly granted the prosecutor's motion, without allowing the appointed defense counsel an opportunity to present contrary authority (A51-53). No further evidence was then offered by either side. [As a result, it was not revealed at the suppression hearing that Ms. Clontz was actually

the former wife of Petitioner King (See documents from the Common Law Record at A23 and A115).]

The Petitioners next challenged the lawfulness of the police search on appeal to the Illinois Appellate Court, Third Judicial District, which on March 23, 1977, affirmed the judgment of the trial court, summarily disposing of Petitioners' constitutional assertions by deciding that they lacked standing to complain of the disputed search. On April 13, 1977, the Appellate Court denied Petitioners' Petition for Rehearing.

On September 30, 1977, the Illinois Supreme Court refused to review this case and the constitutional claim made herein.

REASON FOR ALLOWING THE WRIT

THIS COURT IS REQUESTED TO SETTLE A QUESTION WHICH HAS BEEN CONFUSED BY CONFLICTING AUTHORITY, WHETHER A LEGITIMATE PASSENGER IN AN AUTOMOBILE HAS STANDING TO CHALLENGE THE LEGALITY OF A POLICE SEARCH OF THE AUTOMOBILE IN WHICH HE WAS RIDING; AND, ALSO THIS COURT IS REQUESTED TO DECIDE WHETHER THE "DIRECTED AT" THEORY FURNISHES A VALID, INDEPENDENT BASIS FOR STANDING TO CONTEST THE LAWFULNESS OF A SEARCH.

The underlying problem in this case should be relatively simple and clear-cut; and, no doubt, it involves a factual situation which frequently arises. Yet, there is an almost unexplainable split of authority in this area of the law. Due to the adverse rulings of the trial court and the Appellate Court as to the Petitioners' standing, without deciding the merits of their motion to suppress, it can be assumed for the purposes of this petition that the search of the automobile in which they were riding as passengers was unlawful. Consequently, the only issues presented herein concern the Petitioners' right to object to that search.

Petitioners, of course, rely first upon this Court's rationale in Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, 78 A.L.R. 2d 233 (1960) which apparently abolished subtle property law distinctions in the determination of standing to challenge the legality of a search. And, as further defined in Brown v. United States, 411 U.S. 223, 229, 93 S. Ct. 1565, 1569, 36 L. Ed. 2d 208, 214 (1973), the test announced by this Court seems to be that standing exists where the defendant either (a) is on the premises at the time of the contested search, (b) alleges a proprietary or possessory interest in the premises, or (c) is charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. In the case-at-bar, the Petitioners initially assert their standing based upon the first criteria of the Brown test, their presence in the automobile at the time of the search. They have not claimed a proprietary or possessory interest in the automobile; nor were they convicted of an offense which includes, as an essential element, possession of the fruits of the search; although, it can fairly be said that they could not have been convicted were it not for the evidence thus obtained.

Unfortunately, most of the decisions by lower federal courts involve situations where the defendant was not actually in the car at the time of the disputed search and, therefore, are not directly on point, e.g., United States v. West, 557 F. 2d 151 (4th Cir., 1977). However, at least a few courts have recognized that the defendant's lawful presence in the car was sufficient to confer standing. See United States v. Holmes, 521 F. 2d 859, 867 (5th Cir., 1975), affirmed in relevant part on rehearing en banc, 537 F. 2d 227 (5th Cir., 1976); Bustamonte v. Schneckloth, 448 F. 2d 699, 700 n. 1 (9th Cir., 1971). reversed on other grounds, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); and United States v. Peisner, 311 F. 2d 94, 105, 5 A.L.R. 3d 1196, 1211 (4th Cir., 1963).

But see, United States v. Smith, 357 F. 2d 318, 320 (6th Cir., 1966) and Shurman v. United States, 219 F. 2d 282, 288 (5th Cir., 1955) cert. den. 349 U.S. 921, 75 S. Ct. 661, 99 L. Ed. 1253 (1955).

The greatest difficulty, though, arises when one attempts to reconcile holdings among the state jurisdictions. Indeed, a number of state courts have concluded that automobile passengers have standing to contest a search of the automobile in which they were riding.[2] On the other hand, decisions on point are by no means uniform. Some state courts, like in Illinois, have arrived at the opposite result by rejecting the Jones principle of "legitimately on the premises". Outlining the rationale of these decisions cannot be accomplished with any ease. However, suffice it to say, various state courts still prefer pre-Jones authority or have simply found Jones to be distinguishable where the premises searched was an automobile.[3]

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[2]See Mullins v. State, 35 Md. App. 605, 371 A. 2d 713, 716 (1977); State v. Bresolin, 13 Wash. App. 386, 534 P. 2d 1394, 1402 (1975); Wing v. State 490 P. 2d 1376, 1380 (Okla. Cr., 1971); and Paxton v. State, 263 N.E. 2d 636, 642 (Ind. S. Ct., 1970). See also, State v. Gaines, 40 Ohio App. 2d 224, 318 N.E. 2d 857, 861 (1974); Hodges v. State, 267 So. 2d 798, 802 (Ala., 1972); State v. Osborn, 200 N.W. 2d 798, 803-806 (Iowa S. Ct., 1972); People v. Marshall, 25 Mich. App. 376, 181 N.W. 2d 578, 580 (1970); and People v. Smith, 35 Misc. 2d 533, 230 N.Y.S. 2d 894, 900 (1962).

[3]The Supreme Court of Kansas, for example, in State v. Edwards, 197 Kan. 146, 415 P. 2d 231, 233-234 (1966), believed Jones to be distinguishable and, also, declined to follow United States v. Peisner, 311 F. 2d 94 (4th Cir., 1963). This is still the prevailing view in Kansas, e.g., State v. Heath, 222 Kan. 50, 563 P. 2d 418, 420 (1977). Another state which remains unaffected by Jones, so far as automobile passengers are concerned, is Missouri, notwithstanding an excellent treatment of Jones by the Supreme Court of Missouri in In Re J.R.M., 487 S.W. 2d 502, 505-509 (1972). But see, State v. Perkins, 543 S.W. 2d 805, 807-808 (1976) and State v. Browner, 514 S.W. 2d 355, 356 (1974). See also, the interesting comment in Ellis, 34 Missouri Law Review 575, 582-584 (1969). Some cases from other state jurisdictions of note include: Miller v. State, 520 S.W. 2d 729, 733-734 (S. Ct. Tenn., 1975), cert. den. 423 U.S. 849, 96 S. Ct. 91, 46 L. Ed. 2d 72 (1975) [disclaimer of ownership and not present at time of search]; State v. Patterson, 252 So. 2d 398, 400 (Fla. App., 1971) [Jones not mentioned in opinion]; State v. Hamilton, 264 N.C. 277, 141 S.E. 2d 506, 512 (1965), cert. den. 384 U.S. 1020, 86 S. Ct. 1936, 16 L. Ed. 2d 1044 (1966), habeas corpus denied, 260 F. Supp. 632 (E.D.N.C., 1966), affirmed, 382 F. 2d 296 (4th Cir., 1967) [consent to search given by driver]; and Head v. State, 246 Miss. 203, 136 So. 2d 619 (1962), cert. den. 317 U.S. 910, 83 S. Ct. 251, 8 L. Ed. 2d 179 (1962) [apparently rejected on the basis of Jones in Hamburg v. State, 248 So. 2d 430, 431 (Miss. S. Ct., 1971)]. See also, the discussion in Grant, 46 Mississippi Law Journal 147, 163 (1975).

But, despite a divergence of opinion, Petitioners believe the principles announced by this Court in Jones and Brown should control here. It appears to be well established that, in the case of a fixed structure, one who was lawfully on the premises had standing to challenge a search thereof, e.g., United States v. Brown, 540 F. 2d 1048, 1056-1057 (10th Cir., 1976). And, there is no logical justification for a different rule as regard to standing when the premises searched happened to be an automobile. See Rios v. United States, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); Cotton v. United States, 371 F. 2d 385, 391 (9th Cir., 1967); and People v. Feliciano, 70 Misc. 2d 83, 332 N.Y.S. 2d 830, 834 (1972). See also, Weeks, 6 Arizona Law Review 65, 73-74 (1964). Although the continuing validity of Jones had been subjected to some attacks in recent years, the principle of standing from legitimate presence on the searched premises has not been materially affected. See generally, Duncan v. State, 276 Md. 715, 351 A. 2d 144 (1976). In any event, whether Jones has been eroded is for this Court to say, cf. United States v. Alewelt, 532 F. 2d 1165, 1167 (7th Cir., 1976).

Moreover, all other considerations aside, Petitioners should be accorded standing simply because they were the true objects or targets of the search, cf. United States v. Jeffers, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 2d 59 (1951). The obvious purpose of the police in stopping the car in which Petitioners were riding and in conducting the search, was to determine if the Petitioners were the two male robbers. This action, then, was in reality directed at them and not at their female companions, one of whom turned out to be the registered car owner. Accordingly, it is absurd to conclude that it was solely someone else's privacy which was violated here. To be sure, this most logical theory of standing has not been clearly recognized by this Court, and there is a sparcity of authority thereon, but see then Judge Stevens remarks in United States v. Lisk, 522 F. 2d 228, 232-233 (7th Cir., 1975)

where he made the following observation, referring to United States v. Jeffers:

> . . . Jeffers' standing to challenge the search as well as the seizure might have been sustained on three alternative theories. (1) As a regular invitee, even though he was not present at the time of the search, his interest in the premises was sufficient to make the search an invasion of his privacy as well as his aunts'; (2) the search was 'directed at' him in the sense that the police were looking for his narcotics; or (3) that his interest in the seized property gave him standing to challenge the search that led to the seizure as well as the seizure itself.
>
> In later cases the Supreme Court has cited *Jeffers* as though it was decided on the first theory, that the defendant's interest in the searched hotel room rather than in the seized property allowed him to challenge the search . . .
>
> The *Jeffers* opinion itself emphasizes the fact that the police entered the hotel room 'for the sole purpose of seizing respondent's narcotics.' Thus, the Court seemed to rely on the second theory - that the search was directed at Jeffers - as the basis for its holding in that case that the search and seizure were not 'isolable'. . . (emphasis added) 522 F. 2d at 232.

Then, in United States v. Potter, 419 F. Supp. 1151, 1156-1157 (N.D. Ill., 1976), Judge Decker questioned Justice Stevens' analysis although, as in Lisk, the validity of the so-called "directed at" theory did not have to be determined to resolve the case under review. But, Judge Decker's views notwithstanding, the Seventh Circuit United States Court of Appeals has recently persisted in its recognition of this theory in the Lisk case on rehearing following remand, wherein the per curiam opinion states:

> If the record has disclosed that the search of Hunt's car had been intentionally 'directed at' Lisk, the Fourth Amendment's protection might apply to Lisk. 522 F. 2d at 231, 232. Concern for the important values inherent in the Fourth Amendment require, in this respect, that the burden fall upon the Government to show the absence of a search intentionally directed at the accused. 559 F. 2d 1108, at 1111 (7th Cir., 1977).

See also, the comment on the Lisk case in Young, 64 Georgetown Law Journal 1187, 1193-1197 (1976). And, for other cases lending support to the "directed at" theory, see: United States v. Cobb, 432 F. 2d

716, 720 (4th Cir, 1970) and United States v. Fay, 344 F. 2d 625, 628-629 (2nd Cir., 1965).

In the case-at-bar, albeit in a slightly different context than in Lisk, the disputed search was "intentionally directed at" the Petitioners. Hence, this is a proper case for application of the "directed at" theory as a fourth, independent basis for standing.

The instant case, therefore, presents a twofold reason for this Honorable Court's attention; to settle a conflict of authority on a matter of fundamental constitutional right and to decide whether the "directed at" theory for standing is valid.

CONCLUSION

Wherefore, Petitioners respectfully request that a Writ of Certiorari issue to the Appellate Court of Illinois, Third District.

Respectfully submitted,

ROBERT AGOSTINELLI
Deputy Defender

G. JOSEPH WELLER
Assistant Defender

Office of the State Appellate Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONERS

This Petition was prepared with
the assistance of Josette Skelnik
a Law Student at Northwestern
University School of Law.